

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERJUAN ERWIN HAMILTON,

Defendant-Appellant.

UNPUBLISHED

December 28, 2010

No. 288048

Berrien Circuit Court

LC No. 2008-401841-FC

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f). We affirm.

In April 2008, defendant and his then-girlfriend, A.M., lived together in a one-bedroom apartment. On April 13, at defendant's suggestion, A.M. invited her friend, the victim in this case, to the apartment. A few minutes after the victim arrived, A.M. left to call her mother. The victim testified that when A.M. left the bedroom, defendant tackled her on the bed, pinning her wrists to the top of her head. When she fought and kicked, defendant angrily told her to "Shut up bitch, stop fighting." When defendant released her and she attempted to leave, he blocked her path and raised his fist. Defendant then had the victim undress and lie on her back on the bed. After attempting to penetrate the victim vaginally, defendant told the victim, who was crying, to get on her hands and knees, called her vulgar names and penetrated her anally. When the victim told defendant that he was hurting her, he put his hands to her neck as though he were going to choke her and told her to be quiet. He then penetrated her vaginally. Thereafter, defendant had the victim get on her knees on the floor and forced her to put his penis in her mouth.

A.M. returned to the apartment approximately 45 minutes after leaving, finding the bedroom door locked. When she knocked on the door, defendant indicated that he could not let her in. A.M. waited in the living room; approximately 15 minutes later, defendant came out of the bedroom and went into the bathroom. The victim left approximately five minutes later, without saying anything. After leaving the apartment, the victim went directly to her grandmother's house. The victim's grandmother confirmed that the victim appeared to be in shock when she arrived. Her eyes looked glazed, there were red marks on her neck and wrists, and she said that she had been raped. She was crying and shaking. After the victim told her grandmother what had happened, the police were contacted. The responding officer testified that

when he arrived at the victim's grandmother's house, the victim was very upset and crying and that her neck was red and there were marks on her wrists. After speaking with the officer, the victim was taken to the hospital. The doctor who examined the victim in the emergency room testified that the victim reported being raped, and the doctor's physical findings comported with the victim's version of the events.

The jury found defendant guilty of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). Defendant was convicted and sentenced as a third habitual offender, MCL 769.11, to three concurrent prison terms of 25 to 50 years.

On appeal, defendant argues that the trial court erred in permitting him to be shackled during the trial proceedings, asserting that the shackling violated his right to due process and deprived him of a fair trial. While we agree that defendant should not have been shackled, we do not find that the shackling error prejudiced his trial.

Ordinarily, this Court reviews a decision to shackle a defendant for an abuse of discretion. *Dixon*, 217 Mich App at 404-405. However, because defendant did not object to the shackling during the trial proceedings, this issue is unpreserved, and therefore, this Court's review of this issue is for plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); see also *United States v Miller*, 531 F3d 340, 346 (CA 6, 2008) (examining the defendant's unpreserved claim that he was improperly restrained for plain error).

Generally, a defendant has a due process right to be free of shackles during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). "Permitting a defendant to appear at a jury trial free from handcuffs or shackles is an important component of a fair trial because having a defendant appear . . . handcuffed or shackled negatively affects the defendant's constitutionally guaranteed presumption of innocence." *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) (citation omitted). This right, however, is not absolute; a trial court may order a defendant to be restrained where it "is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

Although the decision to shackle a defendant is within the court's discretion, the decision must be supported by evidence in the record. *Dunn*, 446 Mich at 425; see also *Banks*, 249 Mich App at 257. Here, the record of the trial proceedings contains no mention of defendant being shackled, let alone of the reasons for the shackling. At the evidentiary hearing held in connection with defendant's motion for a new trial, the trial court stated that the sheriff had "special concern" about defendant and the court permitted defendant to be shackled because he had served time in prison, he had several prior CSC convictions, and he was previously charged with torturing or killing animals. The trial court did not make any finding that defendant posed a risk of escape or that he had threatened to injure persons in the courtroom or that he had disrupted proceedings. Therefore, especially considering the minimal nature of the trial court's statements on the record, we find the reasons cited by the trial court for shackling defendant to be insufficient.

In *People v Baskin*, 145 Mich App 526, 546; 378 NW2d 535 (1985), this Court held that the trial court abused its discretion when it permitted the defendant to be shackled during trial.

The defendant, a prison inmate, was convicted of two counts of assault on a prison employee. *Id.* at 529. Out of concern for the safety of others in the courtroom, the trial court ordered that he be shackled during the trial. *Id.* at 545. This Court reasoned, however, that because there was no evidence that the defendant would not cooperate with the proceedings, would attempt to escape, or presented a security risk to others in the courtroom, the trial court's decision was in error. *Id.* at 545-546. Likewise, in this case, although defendant had prior CSC convictions and he may previously have been involved in abusing and killing animals, there was no indication in the record that he had ever disrupted court proceedings, threatened the safety of those in the courtroom, or threatened to escape. See *Dunn*, 446 Mich at 425. A trial court may only shackle a defendant "in the presence of a special need." *Deck v Missouri*, 544 US 622, 626; 125 S Ct 2007; 161 L Ed 2d 953 (2005). The record does not indicate that there was such a special need in this case.

That said, however, in order to warrant reversal because of the use of shackles during trial, a defendant must establish prejudice. *People v Horn*, 279 Mich App 31, 36-37; 755 NW2d 212 (2008), citing *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988) and *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). Typically, a defendant shows prejudice by demonstrating that the shackles were visible to the jury. *Horn*, 279 Mich App at 36-37; see also *Deck*, 544 US at 635. Where a trial court orders a defendant to be shackled without adequate justification, the error is subject to harmless error analysis. *Deck*, 544 US at 635. In order to be considered harmless, the prosecution must normally "prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" *Id.*, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). Contrary to defendant's argument on appeal, however, where, as here, the constitutional error is unpreserved, the defendant bears the burden of proving that the shackling error prejudiced his trial. See *Carines*, 460 Mich at 763-764; see also *Miller*, 531 F3d at 346.

While the trial court erred by permitting defendant to be shackled, defendant has not established plain error affecting his substantial rights. The jury's exposure to the shackling was quite limited in that only two of the deliberating jurors indicated that they saw the shackles, and, those jurors specifically indicated that the shackling had no influence on their verdict. Moreover, given the substantial evidence of guilt presented at trial, defendant cannot establish that the shackling error affected the outcome of the case. See *Carines*, 460 Mich at 763-764 (stating that under the plain error rule, the error must have affected the outcome of the lower court proceedings).

The victim provided graphic and detailed testimony regarding the sexual assaults, which was corroborated by the physical findings of her examining doctor, as well as by the testimony of A.M., the victim's grandmother, and the responding officer. Further, defendant's behavior after the assaults also pointed to his guilt. He repeatedly informed the police that there had been no sexual contact between him and the victim. After his arrest, however, he told a fellow inmate that he and the victim had engaged in consensual, sexual relations. According to that inmate, defendant then wrote letters in which he attempted to have A.M. forge a letter from the victim stating that victim planned to testify falsely that she had been raped. Although defendant claimed he did not write the letters, A.M. identified his handwriting. Given the overwhelming amount of evidence presented at trial establishing defendant's guilt, he cannot prove that the trial court's shackling error affected the outcome of the case.

Defendant argues, alternatively, that his trial counsel was ineffective for failing to object to the shackling. Defendant preserved this claim by raising it in his motion for a new trial. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews factual findings for clear error, but reviews de novo questions of constitutional law. *Id.*

To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, the defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id.* at 146. For the reasons set forth above, defendant cannot establish that it is more probable than not that the shackling affected the outcome of the case. Therefore, he cannot establish his claim of ineffective assistance of counsel arising from a failure to object to the shackling.

Defendant next argues that during closing argument, the prosecutor improperly disparaged his exercise of his right to trial and his right to confront and cross-examine the victim. Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's remarks. We disagree.

This Court reviews defendant's unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only if plain error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449, quoting *Carines*, 460 Mich at 763. Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Ackerman*, 257 Mich App at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be reviewed as a whole and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, and need not state the inferences in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Defendant challenges these remarks made by the prosecutor during closing argument:

Finally, there's been no even hint or suggestion of [the victim] having any motivation to lie. It's not a scorned lover situation. It's not a custody battle. It has nothing—There's been no suggestion or hint of what possible motivation she would've Now, did—do you think she was gonna leave that place if she was . . . up and go directly to her grandmother's like this? Do you think if she was—

had volunteer or consensual sex with the defendant and she was just—didn't want [A.M.] to be upset, do you think she would've gone directly over to her grandmothers? Do you think she would've made up this story to save [A.M.]? [A.M.]—He claims he and [A.M.] broke up a month ago. He claims he had other women on the line.

Would've made a lot more sense if that was the reason for the lie; it would've made a lot more sense if that's what happened, that it happened the way he said for [the victim] just to have kept her mouth shut and hoped [A.M.] didn't find out. She gonna put herself through all of that misery, the physical exam, the counseling, she gonna fake all that stuff, coming here to court and going through this? Oh, yeah, gee, that's a lot of fun. There's been no even hint of any motive whatsoever.

Defendant argues that in making these statements, the prosecutor disparaged the exercise of his right to trial and right to confront and cross-examine the victim. Reviewed in context, however, it is apparent that the prosecutor was not improperly disparaging defendant's exercise of his constitutional rights. Rather, the prosecutor was responding to defendant's argument that the victim had a motive to fabricate her testimony. During his opening statement, defense counsel stated that the sexual relations in this case were consensual and that the victim's claim that she had been raped was simply "lover's remorse." Throughout the trial, defense counsel attempted to establish that there had been no force. In closing, the prosecutor responded by pointing out that the victim had no motive to lie and that it was unlikely she would put herself through physical exams, counseling, and the trial proceedings for the sake of a lie. A prosecutor may argue the credibility of a witness. *Dobek*, 274 Mich App at 66. Accordingly, we find that the prosecutor committed no misconduct.

Defendant again argues, in the alternative, that his trial counsel was ineffective for failing to object to the prosecutor's statements. However, considering that the prosecutor's statements were proper, any objection by defense counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *Thomas*, 260 Mich App at 457. Moreover, given the substantial evidence of defendant's guilt presented at trial, he cannot establish that counsel's failure to object affected the outcome of the case. Therefore, defendant's ineffective assistance of counsel claim is without merit. See *Henry*, 239 Mich App at 146.

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Donald S. Owens